American Pacific Concrete Pipe Company, Inc. *and* General Teamsters, Sales Drivers, Food Processors, Warehousemen and Helpers Local 871, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 31-CA-10098

July 23, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On September 16, 1981, Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We are in agreement with the Administrative Law Judge that Respondent violated Section 8(a)(5) of the Act by failing and refusing to bargain with the Union, by withdrawal of recognition from the Union, by Respondent's refusal to recall its employees, and by unilaterally changing the conditions of employment of its unit employees; that Respondent violated Section 8(a)(2) of the Act by suggesting to its employees that they join the Brick and Clay Workers Union and designate it as their bargaining representative, and by signing a collective-bargaining agreement with the Brick and Clay Workers during the pendency of a bargaining relationship with the Union; and that Respondent violated Section 8(a)(3) of the Act by failing and refusing to recall its unit employees upon resumption of its operations and pursuant to agreement with the Union. We do not, however, adopt the reasoning of the Administrative Law Judge in so finding.

Respondent, also known as Ampac, and owned by brothers Al and Carlos Bea, is a construction products supplier with an in-house transportation capability from plant to jobsite. Its production and maintenance employees are represented by the United Brick and Clay Workers of America, Local No. 820, AFL-CIO, hereinafter Brick and Clay Workers, while its 10 drivers, the unit at issue herein, are represented by Teamsters Local 871.[3]

The record reflects that the Union had maintained a bargaining relationship with Respondent for approximately 15 years, and had entered into successive collective-bargaining agreements with Respondent during that period of time, the latest contract expiring September 30, 1979. During negotiations for a new contract, Respondent proposed that the existing language with respect to recall rights[4] be deleted, and that construction industry-type language be substituted, so that, if an employee were to be on layoff status for more than 30 days, he would automatically be terminated. The proposed change would also have the effect of deleting the progressive disciplinary system then in force, in that Respondent would only have to lay off an employee for 30 days in order to terminate him.

Prior to the expiration date of the contract the Union and Respondent had reached agreement on all issues except for Respondent's proposed changes with respect to layoff, which the Union

[1] Respondent contends that the Administrative Law Judge erred in granting the General Counsel's motion, made at the hearing, to amend the complaint to allege that Respondent violated Sec. 8(a)(2) of the Act by suggesting to its employees that they join the Brick and Clay Workers Union and designate it as their bargaining representative, notwithstanding the fact that Teamsters Local 871, hereinafter the Union, had already been designated the exclusive bargaining representative of the unit employees; and by signing a collective-bargaining agreement with the Brick and Clay Workers. Contrary to Respondent, we hold that the Administrative Law Judge properly granted the motion to amend, although, in so holding, we do not rely on fn. 6 of his Decision. "It is well settled that the complaint may allege violations of a different section of the Act than that alleged in the charge if they are closely related to the violations named in the charge and occurred within 6 months of the filing of the charge." *Eugene and Veronica McManus, Co-Partners, d/b/a Sunrise Manor Nursing Home*, 199 NLRB 1120, 1121 (1972). In this case, the basis for the amendment is the close relationship between the 8(a)(2) allegation and the 8(a)(5) allegations of the charge and complaint, which are supported by the same record evidence. Thus, as shall be fully discussed, *infra*, although obligated to bargain with the Union, Respondent attempted to engender support among its employees for the Brick and Clay Workers Union and, in fact, signed a collective-bargaining agreement with that union. Accordingly, we hold that the motion to amend was properly granted.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent, in its exceptions, also asserts that the Administrative Law Judge was biased and prejudiced against it, and, in support of such assertion, points to portions of the Administrative Law Judge's Decision as being "couched in uncharacteristically strong language that offers little factual support" for his conclusions. Respondent concedes, however, and we agree, that the hearing was conducted in a fair and regular manner. We also agree with Respondent that the Administrative Law Judge's use of language in parts of his Decision may not, perhaps, be properly characterized as judicial. Nonetheless, we have carefully reviewed the record and the Administrative Law Judge's Decision, and we find nothing therein which would support an allegation of bias and prejudice; and, in any event, we have made our own findings herein and rely on them.

[3] The appropriate unit herein is: All drivers employed at Respondent's Upland, California facility; excluding office clerical employees, guards and supervisors as defined in the Act.

[4] All previous contracts had provided for recall rights lasting 12 months.

strongly opposed. At the October 2, 1979, negotiation session, however, Al Bea informed the Union that the contract had expired, that he no longer had any unit employees working at Ampac, and that the trucks owned by Ampac were to be taken to Irwindale to be auctioned off.[5] At the October 2 meeting, Respondent continued to take a firm position that the construction industry-type layoff language must be included in any contract, and also indicated that there was no point in having further meetings until the unfair labor practice charge was resolved, but nonetheless scheduled a negotiation session for October 12. In the interim, however, on October 4, the Union received Respondent's 7-day notice to terminate the collective-bargaining agreement.

At the already scheduled October 12 meeting, after being assured by Respondent that it was indeed going to sell its trucks and conclude its transportation activities, as had been indicated at the October 2 negotiation session, the Union and Respondent entered into the following agreement:

> It is hereby agreed in the event AMPAC should replace the use of the common carrier, by utilizing their own company owned equipment within the next year from this date, the company will recognize Teamsters Union Local 871 and will bargain with said Union on behalf of any truck drivers employed to operate such equipment.
>
> In the event AMPAC purchases new equipment within the one year period, they will offer reemployment to those employees displaced on October 1, 1979 and will recognize their prior seniority for such reemployment.

As part of the overall agreement reached that day, Respondent agreed to pay the laid-off employees 11 days' pay, and the Union agreed to withdraw the unfair labor practice charge it had filed with the Board on October 2, 1979.

The record reflects, however, that Respondent was unsuccessful in its attempt to auction its trucks,[6] and soon thereafter arrived at an oral agreement with Citizens Trucking, whereby Ampac trucks were leased to Citizens, which could then use the Ampac-owned trucks at its discretion. The relationship with Citizens, however, was not to Al Bea's liking[7] and, on April 1, 1980, Bea entered into a lease agreement with J. D. Dean Trucking, whose principal owner was J. D. Dean, a Riverside, California, plastic surgeon who also possessed a P.U.C. license.

Ampac's trucks, which had been at Citizens' yard, were then returned to Ampac's premises, where three former Ampac drivers,[8] as well as some new hires, began delivering Ampac pipe with Ampac trucks—now leased to Dean,[9] and which now carried Dean decals. The lease, which on its face had a duration of 12 months, was decidedly favorable to Ampac. Thus, the lease specified that the trucks could not be used to transport hazardous materials, nor could they be used for towing, pushing, or any other purpose than that for which they were designed; i.e., the hauling of pipe. In addition, the lease specified that the vehicles could only be used within a 300-mile radius of Upland. The lease also specifically stated that each vehicle could only be driven by a safe, competent, and duly licensed driver, hired and paid by Dean; but also provided that, upon complaint by Ampac specifying reckless, careless, or abusive handling, Dean was required to remove that driver and replace him with a competent substitute. With respect to maintenance, the lease specified that Dean would pay costs, but that Ampac would perform servicing. The lease further provided that, if Dean took a truck to an authorized service station, and if the cost was more than $50, Dean was to consult Ampac, which would provide written instructions. Ampac would insure the trucks, which would be available at all times for inspection by Ampac. Finally, Dean was required to pay a $1,000 security deposit to Ampac which would be repaid to Dean if all the "terms, covenants, and conditions are fully complied with."

The lease, however, did not totally reflect the relationship between Ampac and Dean—which was, in fact, almost completely dominated by Ampac. At this juncture of our analysis, some discussion of the role of Chris Adzovich is in order. Adzovich, whom Al Bea described as "a legend in his time," and as having written "the book on pipe," had, as

[5] On September 29, 1979, Respondent had informed its drivers that there was no further work, and instructed them to telephone the office for more information. On being informed by Respondent's employees what Respondent had done, the Union filed a grievance, as well as an unfair labor practice charge with the Board.

[6] The auction was held on October 17, 1979. Al Bea surmised, at the hearing, that the lack of success at the auction was due to the fact that the trucks were fashioned for the hauling of pipe, and could not readily be used for transporting other materials.

[7] Citizens had been using Ampac trucks to haul materials other than pipe, and relegating delivery of Ampac pipe to independent drivers who knew little or nothing about hauling pipe—resulting in a sharp increase in pipe breakage.

[8] Bill Martin, Bob Bourneman, and Charles Reese.

[9] The record reflects that the operations being carried out during the lease period were identical to those carried out while Ampac was in full control of the trucks. Thus, Ampac pipe and related construction materials continued to be delivered to Ampac customers; and there is no record evidence that Dean used the trucks for any purpose other than that dictated by Ampac. In addition, for a period of time after the lease became effective, Bob Miller, an Ampac engineer, carried out dispatch duties. Charles Reese was thereafter made dispatcher when Al Bea determined that Miller had too much other work to do to enable him to carry on the dispatch work as well.

the result of illness, fallen on hard times. Bea, as a favor, had initially hired Adzovich as a dispatcher, but Adzovich's expertise in the field of pipe construction was such that he soon became Al Bea's "exec"; and after Adzovich officially retired on December 31, 1979, he acted as a consultant for both Bea and Dean.[10] As shall be seen, *infra*, both Bea and Adzovich played pivotal roles in the operations of Ampac and Dean.

The record reflects that Bea introduced Dean to Adzovich, and suggested that Adzovich could help Dean run the operation. As noted in footnote 10, *supra*, it is not clear whether Dean formally hired Adzovich, although Adzovich maintained an office at Ampac's facility, and individuals seeking work with Dean applied for the jobs through Adzovich.

Soon after the lease was signed with Dean, in April 1980, the drivers then employed found authorization cards for the Brick and Clay Workers attached to their timecards. Although the record is not entirely clear as to what was said, the evidence is plain that Adzovich raised, with the drivers, the subject of joining that union, that the drivers never saw a representative of that union, and that at least some of the drivers signed cards and joined the Brick and Clay Workers that day.

Thereafter, on May 1, 1980, a collective-bargaining agreement was entered into between the Brick and Clay Workers and Dean, although, as will be seen, Al Bea and Chris Adzovich were the leading actors in this scenario. Antonio Sanchez, the International representative for the Brick and Clay Workers,[11] testified concerning how he came to represent the drivers. He stated that "I was at the plant and these trucks were coming in there and they were nonunion and I wanted to represent them." Sanchez, who has never met Dr. Dean,[12] negotiated the contract for the drivers in Bea's office, with Bea and Adzovich. Sanchez also testified that the only issue with which Bea was concerned was "to retain jurisdiction over the drivers because they couldn't watch them once they went on the road . . . he wanted to be able to discipline them if they needed discipline without a recourse to any warning notices or what have you. I gave him that." Sanchez also agreed to a deletion of the "just cause" phraseology for discharge. The contract was to be effective through December 1980.

Bea also testified about these negotiations, stating that, with respect to the construction language provision,

> I gave them [Adzovich and Sanchez] the master labor agreement which sits on my desk.
>
> Q: Did You urge him [Adzovich] to try to get that kind of language in the agreement?
>
> A: Sure. I thought that was equitable language.

Later in his testimony, Bea was asked:

> Q: Would you recommend to other people in the pipe business . . . that they'd have [construction] language such as was inserted in this agreement?
>
> A: No. Each company does it own labor negotiations. You know, they have labor negotiators and divisions and all that kind of good things. I don't have any of that. I'm a mom-and-pop store. What I wanted I wanted for Al Bea . . . ."[13]

The May 1980 agreement continued until November 25, 1980, when Bea wrote to the Brick and Clay Workers that Ampac had been operating some rolling stock as of October 13 of that year. Thereafter, in January 1981, Bea negotiated a new collective-bargaining agreement for his production and maintenance employees, in which the drivers were included. The new contract, however, retained the construction industry language, which applied only to the drivers.

Finally, although the lease with Dean was to have lasted for 12 months, the record does not reflect any formal termination of the lease when, in October 1980, Ampac openly began to operate its own trucks. It is thus apparent that Dean Trucking materialized, and then faded away, at Ampac's convenience. Indeed, the Brick and Clay Workers, signatory to the May 1980 contract with Dean, was notified 5 weeks after the fact by Al Bea that Ampac was, once again, operating rolling stock. No notice with respect to Dean's status was communicated to that union by either Dean or Bea.

The record thus supports the conclusion that Ampac had an obligation to bargain with the Union as of April 1, 1980, when it terminated its verbal lease agreement with Citizens, and entered

[10] Although Bea paid Adzovich for his consulting duties, Bea had no knowledge of whether Dean paid Adzovich for any services rendered, and the record reflects that Elizabeth Cox, an office employee for Ampac who also acted as Dean's bookkeeper, never saw any checks made out to Adzovich. Finally, Bea testified that all the employees knew that Adzovich was Bea's right-hand man.

[11] As noted above, the Brick and Clay Workers had represented Ampac's production and maintenance employees since the early 1970's.

[12] Indeed, Dean remains a shadow figure throughout. The record reflects that he visited the Ampac facility perhaps once or twice a month, and that his only other contact was through Elizabeth Cox, who served in the dual role of Ampac office employee and Dean's bookkeeper.

[13] As is evident from the record, Bea was concerned about retaining control over "his" drivers, including the ability to discharge them at his pleasure—even though the drivers were ostensibly employees of Dean. Indeed, Bea's entire reason for insisting on the construction industry-type language was that "I had an unblemished record of never being able to have a warning letter stick or get a favorable ruling in a grievance. I always lost."

into what we find to be an *alter ego* arrangement with Dean Trucking. As in most *alter ego* situations, Ampac and Dean had substantially identical business purpose, operations, equipment, and customers.[14] They did not, however, share common ownership; nor, did they, on paper, share common management or supervision. In point of fact, however, Ampac exercised a degree of control over Dean so as to obliterate any separation between them. Thus, as reflected in the record and discussed above, the lease document itself gave Ampac significant control over the equipment by placing limitations on its use, as well as over Dean's personnel.[15]

With respect to supervision, the record reflects that Bill Miller, Ampac's engineer-dispatcher, hired Charles Reese as a driver for Dean; and, as noted above, individuals filed job applications for Dean with Adzovich. In addition, Miller scheduled all deliveries.[16] There came a time,[17] however, when Al Bea decided that Miller could no longer perform two jobs, and Reese was informed by Bea that Reese would be the new dispatcher, ostensibly for Dean Trucking.

Finally, with respect to the issue of control, the record is clear that Adzovich, and especially Bea, retained absolute control over Dean's labor relations. Thus, as discussed above, it was Adzovich who first spoke to the employees about the Brick and Clay Workers, Adzovich and Bea who hired Dean's employees, and Bea who dictated the terms of the collective-bargaining agreement between Dean and that union for Bea's sole benefit. In short, Bea controlled and orchestrated Dean's business, both from an operational and labor relations standpoint.

Accordingly, based on all of the above, and the record as a whole, we find that Dean Trucking was the *alter ego* of Ampac. In so finding, we rely on the substantially identical business purpose, equipment, type of customer, Bea's and Adzovich's role in the actual day-to-day operations and labor relations of Dean Trucking, the lease agreement favorable to Ampac, and the transient nature of Ampac's and Dean's relationship.[18] See, generally, *Denzil S. Alkire, a sole proprietorship; Upshur Enterprises, Inc.; and Mountaineer Hauling & Rigging, Inc.*, 259 NLRB 1323 (1982).

Having found Dean Trucking to be the *alter ego* of Ampac, we hold that, as of April 1, 1980, the date on which Dean and Ampac entered into their *alter ego* relationship, Respondent Ampac was required to bargain in good faith with the Union, and that, by failing and refusing to do so, Respondent violated Section 8(a)(5) of the Act. Thus, Respondent's October 12, 1979, agreement with the Union required Respondent in the event that Respondent utilized its own equipment—or purchased new equipment—to recognize and bargain with the Union and recall its employees on a seniority basis. Having failed to do so, we additionally find that Respondent violated Section 8(a)(5) of the Act by its withdrawal of recognition from the Union, its refusal to recall its employees as of April 1, 1980, and its unilateral change in the conditions of employment of its employees.[19]

Having found that Respondent was required to bargain with the Union as of April 1, 1980, we also find that Respondent violated Section 8(a)(2) of the Act by encouraging its employees to support the Brick and Clay Workers by signing that union's dues-checkoff or authorization cards, and that Respondent also violated Section 8(a)(2) of the Act when, on May 1, 1980, it signed a collective-bargaining agreement with the Brick and Clay Workers.[20]

Finally, we find that Respondent violated Section 8(a)(3) of the Act by its refusal to recall its employees as of April 1, 1980, when Respondent, in the guise of its *alter ego*, Dean, reinstituted its trucking operations.[21]

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[14] As set out above, Ampac *qua* Dean continued to deliver pipe in the same manner as always, using the same trucks. Since Ampac supplies construction contractors, the customers are not always the same—the type of customer, however, did not vary when Ampac entered into the arrangement with Dean.

[15] As noted above, upon complaint by Ampac specifying reckless, careless, or abusive driving, Dean was required to remove any driver so accused. There was no provision for any investigation by Dean.

[16] The record reflects that Ampac also leased trucks itself, and Miller scheduled these trucks as well.

[17] September 1980 and while the lease agreement with Dean was still in effect.

[18] This transience was based upon Bea's ultimate purpose: to avoid a bargaining relationship with the Union, wherein he would be tied to a progressive system of discipline, as well as to a grievance and arbitration procedure. Thus, on the face of the October 12, 1979, agreement, Ampac remained tied to the Union for a period of 1 year; and, as noted *infra*, Bea wasted no time in openly operating his own trucks—such operation commencing on October 13, 1980.

[19] That the purpose behind Ampac's relationship with Dean was to avoid the October 12, 1979, agreement is not open to question. Thus, as noted above, on October 13, 1980, Bea perfunctorily, and without apparent notice to any of the concerned parties, began operating his own rolling stock.

[20] That Bea's purpose in this whole affair was to avoid a bargaining relationship with the Union, which, he knew, would not capitulate to his demand for the construction industry-type language, the effect of which would give Bea the ability to discharge his drivers at will, is further strengthened by Bea's apparent eagerness to enter into a collective-bargaining agreement with the Brick and Clay Workers which granted Bea's wish.

[21] In so finding, we rely on Respondent's abrogation of its October 1, 1979, agreement with the Union, and disavow the Administrative Law Judge's analysis at par. 7 of his Decision, wherein he appears to find that the drivers were not recalled by virtue of their union activity. The record does not so reflect. Contrary to the Administrative Law Judge, the crux of the 8(a)(3) violation herein is not that certain drivers were singled out because they individually engaged in union activity and were not recalled therefor; but rather that Respondent was obligated *by its*

Continued

CONCLUSIONS OF LAW

1. American Pacific Concrete Pipe Company, Inc., hereinafter referred to as Respondent, and its *alter ego*, J. D. Dean Trucking, are an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. General Teamsters, Sales Drivers, Food Processors, Warehousemen and Helpers Local 871, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. United Brick and Clay Workers of America, Local No. 820, AFL-CIO, hereinafter referred to as Brick and Clay Workers, is a labor organization within the meaning of Section 2(5) of the Act.

4. The appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act is:

> All drivers employed at Respondent's Upland, California facility; excluding office clerical employees, guards and supervisors as defined in the Act.

5. At all times material herein, and continuing to date, the Union has been and is now the exclusive representative for purposes of collective bargaining of the employees in the above appropriate unit.

6. At all times material herein, and continuing to date, Respondent and the Union have been, and continue to be, bound by the conditions of an agreement entered into by them on October 12, 1979, the terms of which are fully set out above.

7. On or about April 1, 1980, and continuing to date, Respondent unilaterally withdrew recognition from the Union, failed and refused to bargain with the Union, unilaterally changed the conditions of employment of its employees, and failed and refused to recall its employees in accordance with the October 12, 1979, agreement between it and the Union, thereby violating Section 8(a)(5) of the Act.

8. On or about May 1, 1980, and continuing to date, Respondent gave assistance to and entered into a collective-bargaining agreement with the Brick and Clay Workers with respect to the employees in the unit set out in Conclusion of Law 4, above, thereby violating Section 8(a)(2) and (1) of the Act.

9. By unlawfully failing and refusing to recall its employees since on or about April 1, 1980, Respondent has thereby violated Section 8(a)(3) and (1) of the Act.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in the unfair labor practices enumerated above, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act as follows:

1. Respondent shall retroactively comply with the terms and conditions of the October 12, 1979, agreement entered into with the Union.

2. Respondent shall cease giving assistance and support to, and shall withdraw and withhold recognition from, the United Brick and Clay Workers of America, Local No. 820, AFL-CIO, in the unit set out in paragraph 4 of our Conclusions of Law, unless and until it is certified by the Board; shall recognize and, on request, bargain with the Union; shall implement and adhere to the October 12, 1979, agreement entered into by Respondent and the Union; and shall recall its employees in accordance with the provisions of that agreement.

3. All employees who may have suffered any loss of pay and benefits beginning on April 1, 1980, shall receive backpay, with interest and benefits, in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[22] Because the record is not clear with respect to the particular employees who were recalled or rehired, or when they were recalled or rehired, we will defer such a determination to the compliance stage of the proceeding.

4. All employees who may have been required to pay dues, fees, and other moneys pursuant to the collective-bargaining agreement with United Brick and Clay Workers, Local No. 820, shall be reimbursed, with interest, by Respondent.

5. Since Respondent has engaged in unfair labor practices of a sufficiently egregious nature as to demonstrate a disregard for its employees' fundamental statutory rights, we shall include in our Order a provision requiring Respondent to cease and desist from in any other manner infringing upon the rights guaranteed to its employees by Section 7 of the Act. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

signed agreement with the Union to bargain with the Union, and to recall the employees if Respondent resumed operations within 1 year; that Respondent entered into an *alter ego* relationship to avoid its obligation to bargain with the Union; and that the drivers were not recalled by virtue of Respondent's attempt to avoid its obligation to bargain. Thus, to the extent that Respondent's refusal to bargain with the Union indicates unlawful motivation with respect to its refusal to recall its drivers, Respondent violated Sec. 8(a)(3) of the Act.

[22] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, American Pacific Concrete Pipe Company, Inc., Upland, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to recognize and bargain collectively with General Teamsters, Sales Drivers, Food Processors, Warehousemen and Helpers Local 871, International Brotherhood of Teamsters, Chauffeurs, Warehousmen and Helpers of America, hereinafter Teamsters Local 871, as the exclusive bargaining representative of a unit of the following employees:

> All drivers employed at Respondent's Upland, California facility; excluding office clerical employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to implement and adhere to the October 12, 1979, agreement entered into between Respondent and Teamsters Local 871, and thereby unlawfully refusing to recall the unit employees as provided by that agreement and unlawfully and unilaterally changing the conditions of employment of the unit employees.

(c) Recognizing or contracting with United Brick and Clay Workers, Local No. 820, as the bargaining representative of any of its employees in the unit set out in paragraph (a) above, for purposes of collective bargaining, unless and until said labor organization has been certified by the National Labor Relations Board as the exclusive bargaining representative of such employees.

(d) Giving effect to any dues-checkoff or authorization card executed by any employee in the unit described in paragraph (a), above, which, on its face, is in favor of United Brick and Clay Workers, Local No. 820; or giving effect to the collective-bargaining agreement with Local No. 820 executed on or about May 1, 1980, or to any extension, renewal, or modification thereof; provided, however, that nothing in this Order shall be construed as requiring Respondent to take any action unfavorable to any individual employee regarding wages, hours, and other substantive terms or conditions of employment; provided further that nothing in the first proviso shall limit the rights of Teamsters Local 871 with respect to action which Respondent has taken unilaterally so far as Teamsters Local 871 is concerned.

(e) Unlawfully failing and refusing to recall its employees as provided in the October 12, 1979, agreement, and thereby discriminating in regard to their hire and tenure of employment or any term or condition of their employment in order to discourage membership in Teamsters Local 871.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) On request, recognize and bargain collectively with Teamsters Local 871 as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Implement and adhere to the October 12, 1979, agreement between Respondent and Teamsters Local 871.

(c) Withdraw and withhold all recognition from Brick and Clay Workers Local No. 820 as the exclusive bargaining representative of its employees in the unit set out above in paragraph 1(a), for the purpose of collective bargaining, unless and until said labor organization shall have been certified by the Board as the exclusive representative of such employees.

(d) In accordance with the October 12, 1979, agreement, offer its employees immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any losses they may have suffered by reason of Respondent's failure to adhere to and implement said agreement, in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(e) Reimburse its present and former drivers in the bargaining unit described above for all fees, dues, and other moneys they have been required to pay as a condition of employment by reason of enforcing any current or past collective-bargaining agreement with Brick and Clay Workers Local No. 820, together with interest in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Upland, California, place of business copies of the attached notice marked "Appen-

dix."[23] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

MEMBER JENKINS, concurring:

I concur in the result.

[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to recognize and bargain with General Teamsters, Sales Drivers, Food Processors, Warehousemen and Helpers Local 871, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter Teamsters Local 871, as the exclusive bargaining representative of our employees in the appropriate unit set forth below:

All drivers employed at our Upland, California facility; excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to implement and adhere to our October 12, 1979, agreement with Teamsters Local 871, and WE WILL NOT thereby refuse to recall our employees in the unit set out above, as provided by that agreement.

WE WILL NOT unlawfully and unilaterally change the conditions of employment of our employees in the unit set out above.

WE WILL NOT recognize or contract with United Brick and Clay Workers of America, Local No. 820, AFL-CIO, hereinafter Local 820, as the bargaining representative of any of our employees in the unit set out above, for the purposes of collective bargaining, unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive bargaining representative of such employees.

WE WILL NOT give effect to any dues-checkoff or authorization cards executed by any employee in the unit set out above, which, on its face, is in favor of Local 820, and WE WILL NOT give effect to the collective-bargaining agreement with Local 820, executed on or about May 1, 1980, or to any extension, renewal, or modification thereof; but we are not required to take any action unfavorable to any individual employee regarding wages, hours, and other substantive conditions of employment; nor will anything in the first proviso limit the rights of Teamsters Local 871 with respect to action which we have taken unilaterally with respect to Teamsters Local 871.

WE WILL NOT refuse to recall our employees in the unit described above as provided for in our October 12, 1979, agreement with Teamsters Local 871, in order to discourage membership in Teamsters Local 871.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL recognize and bargain collectively with Teamsters Local 871 as the exclusive representative of all our employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL implement and adhere to the October 12, 1979, agreement between us and Teamsters Local 871.

WE WILL withdraw and withhold all recognition from Brick and Clay Workers Local 820 as the exclusive bargaining representative of our employees in the unit set out above, for the purposes of collective bargaining, unless and until Local 820 shall have been certified by the Board as the exclusive representative of such employees.

WE WILL, in accordance with the October 12, 1979, agreement, offer to our employees immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole, with interest, for any losses they may have suffered by reason of our failure to adhere to and implement said agreement.

WE WILL reimburse our present and former drivers, in the bargaining unit described above, for all fees, dues, and other moneys they have been required to pay as a condition of employment by reason of enforcing any current or past collective-bargaining agreement with Brick and Clay Workers Local 820, together with interest.

AMERICAN PACIFIC CONCRETE PIPE COMPANY, INC.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard in San Bernardino, California, on June 2 and 3, 1981, based on a complaint alleging, as amended at the hearing, that American Pacific Concrete Pipe Company, Inc., herein called Respondent, violated Section 8(a)(1), (2), (3), and (5) of the Act on or about April 1, 1980, by discriminating against certain employees in the context of reemploying other employees through an asserted *alter ego*, and by refusing at that time to bargain collectively with General Teamsters, Sales Drivers, Food Processors, Warehousemen and Helpers Local 871, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, while contemporaneously extending unlawful assistance and support to another labor organization.

Upon the entire record,[1] my observation of witnesses, and consideration of post-hearing briefs, I make the following:

FINDINGS OF FACT AND RESULTANT CONCLUSION OF LAW

Respondent was founded in 1966 and during intervening years evolved to a construction products supplier owned by two brothers with in-house transportation capacity from plant to jobsite. Its production and maintenance employees were represented by United Brick and Clay Workers of America, Local No. 820, AFL-CIO, while its drivers were represented by the Union.[2] The last collective-bargaining agreement with the Union had a term of 3 years expiring September 30, 1979. Alvaro (Al) Bea, Respondent's chief executive officer, testified that by early to mid-1979 he had experienced increasing difficulty with employee attitude as among Teamster-represented drivers, and an exorbitant amount of pipe breakage if not actual sabotage. In consultation with his brother Carlos Bea, Respondent's co-owner and a practicing attorney in San Francisco, it was decided to seek construction industry-type language in any contract renewal, with particular reference to strengthening employer rights of discipline and narrowing traditional protection of "just cause" principles concerning discharge. After the parties exchanged notification of intent to modify the contract, bargaining ensued during August and September 1979. Al Bea and consultant Paul Whaley primarily represented Respondent, while Norman Holman and Bob Molina, both officials of the Union at the time, represented it in these talks. An impasse existed for the final days before contract expiration, with particular reference to Respondent's proposals of tightened, construction industry-type language as to control of employee job behavior.

At this point in time, Respondent employed about 10 drivers to operate its pipe delivery trucks. On September 29, 1979, the drivers were abruptly notified of no further work, with instructions to telephone in for more information. Five days later, Respondent furnished the Union its written notice of contract termination, to be effective October 12, 1979, pursuant to article 36 thereof, and contemporaneously leased its vehicles for pipe hauling purposes to Citizens Trucking, an established contract carrier, after an unsuccessful attempt to sell them at auction. In the flurry following about this time, an unfair labor practice charge of the Union was resolved by written agreement reached October 12, 1979. This agreement, signed for Respondent by auxiliary consultant Jack Wyatt, read:

> It is hereby agreed in the event AMPAC should replace the use of the common carrier, by utilizing their own company owned equipment within the next year from this date, the company will recognize Teamsters Union Local 871 and will bargain

[1] The index of exhibits cannot be reconciled with the manner in which Resp. Exh. 6 was received into evidence. This is because a previously marked Resp. Exh. 6 was withdrawn, and the eventual Resp. Exh. 6, a letter dated July 31, 1979, was erroneously associated by the reporter to witness Cox. In fact, this later exhibit was identified and received into evidence, and all matters inconsistent therewith should be disregarded. This constitutes a correction of the official record.

[2] Respondent maintains its office and principal place of business in Upland, California, where it is engaged in the manufacture of concrete pipe, annually selling goods or services valued in excess of $50,000 to customers or business enterprises within California which themselves meet a jurisdictional standard of the National Labor Relations Board other than that of indirect inflow or indirect outflow. On these admitted facts, I find that Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. The Union is now extinct following merger in December 1980 with Teamsters Local 467, which survives as the viable entity. I find that at all material times the Union was a labor organization within the meaning of Sec. 2(5) of the Act, and that Local 467 is also now a labor organization as statutorily defined. By virtue of its established collective-bargaining relationship with Respondent, which includes the reaching and administration of successive collective-bargaining agreements covering production and maintenance employees, I further find that United Brick and Clay Workers of America, Local No. 820, AFL-CIO, is also a labor organization within the meaning of Sec. 2(5).

with said Union on behalf of any truck drivers employed to operate such equipment.

In the event AMPAC purchases new equipment within the one year period, they will offer reemployment to those employees displaced on October 1, 1979 and will recognize their prior seniority for such reemployment.

This general arrangement continued for 6 months, at which point the function was retransferred to J. D. Dean Trucking, based on a formal lease document of April 1, 1980, providing the basis by which Dean would both pay for leased equipment and charge Respondent for the hauling performed.[3] This entity was dominated by James D. Dean, a plastic surgeon of the vicinity by occupation but also holder of a PUC license for "radial highway" transportation. Effective April 1, 1980, pipe delivery from Respondent's plant was ostensibly performed by Dean Trucking, with its operational needs tended by Chris Adzovich, a semiretired construction authority functioning at the time as "Al Bea's right-hand man," and its payroll, billing, banking, and quarterly tax reporting handled on a side, freelance basis by Elizabeth Cox, Respondent's office manager-bookkeeper and assistant corporate secretary. As this transpired, the several drivers hired by Adzovich, and subject to daily assignment by Respondent's dispatcher Bill Miller, came, in the words of long-service driver Charles Reese, to know "we was going to" join Brick and Clay Workers Local 820, both because management had "some kind of hold on it" and because early after the April 1, 1980, changeover they had found Local 820 authorization cards conveniently pinned to their timecards. In consequence of this, Local 820's financial secretary-treasurer, Antonio Sanchez, conversed with Adzovich, in the presence of Al Bea, and a document reading as follows was produced:

> This Agreement has been made by and between J. D. Dean Company, Inc., of 1574 Heather Lane, Riverside, California, hereinafter referred to as the "Company" and the United Brick and Clay Workers of America, District Council No. 11, and affiliated Local 820, affiliated with the American Federation of Labor and Congress of Industrial Organizations, hereinafter referred to as the "Union" executed this 1st day of May, 1980
>
> Witnesseth:
>
> Section I—Recognition
>
> (a) The Company recognizes the Union as the sole collective bargaining representative of all drivers and maintenance employees in the collective bargaining unit defined in paragraph (b) below for purposes of collective bargaining in respect to rates of pay, wages, hours, and other conditions of employment.
>
> (b) This Agreement shall be binding upon Company's successors, assigns, purchasers, lessees, or transferees, whether such succession, assignment, or transfer be effected voluntarily or by operation of law; and, in the event of Company's merger or consolidation with another company or companies, this Agreement shall be binding upon the merged or consolidated company.
>
> (c) Subject to the new Agreement which is being drawn up, all provisions of the Agreement between the Union and AMPAC, dated January 1st, 1978, shall apply.
>
> (d) With the following addition and exception:
>
> A workman shall cease to be an employee of the Company if any such workman is laid off or terminated.

For an approximate 6-month period following April 1, 1980, this arrangement continued. At that point in time, Al Bea determined that he would reacquire his truck fleet and resume transporting as done up to a year before. In doing so he continued the employment of those who had driven under the Dean banner, a group including several of the drivers formerly represented by the Union. Ultimately, Al Bea wrote to Sanchez as follows, attaching a copy of the October 12, 1979, agreement to this letter of October 25, 1980:

> This will serve to notify you that, as per enclosure, this concern decided to operate some rolling stock as of October 13, 1980.

Cox testified that during the April–October 1980 period she fulfilled all services as described above by a program of minimal distraction from her regular duties with Respondent, actual performance of various clerical functions at her home, and maintaining direct contact with Dean by occasional telephone calls to him or speaking in person when he would randomly appear at plant premises, augmented by two brief visits to his home.

Respondent's defense here is sham, frivolous, and worthy of only the most cursory comment.[4] The case is

[3] In prelude to the lease, Carlos Bea had written confirmatively to Dean Trucking on March 28, 1980. He said:

> This letter is to memorialize our agreement that you will act as Highway Contract Carrier for carriage of AMPAC concrete pipe to jobsites, under the terms of our lease agreement, and that we will pay you for carriage, pursuant to P.U.C. Minimum Rate Tariff No. 15, Item No. 600.
>
> Payment to you will be made upon presentation of freight bills in the form attached.
>
> Your billings should be submitted monthly, using the said "Freight Bill for Transportation of Property at Vehicle Unit Rates."
>
> If you are in agreement with this arrangement, please sign and date the enclosed copy of this letter and return it to our office in Upland; P.O. Box 1409, Upland, California 91786.

[4] Where actual operational controls are never relinquished and "economic realities" of a purported business change are not bona fide, an *alter ego* situation presents the same consequence of the involved entities being "a single employer within the meaning of Section 2(2) of the Act." *Big Bear Supermarkets*, 239 NLRB 179 (1978). This is but a reflection of the Board's quarter-century-old message, written in context of minor relocation within a metropolitan area. The reference is to *California Footwear Company*, 114 NLRB 765 (1955), in which the following passage is found:

> Under these circumstances the fact that there was an economic reason for removal of the plant ceases to be controlling. We can see no real difference between the case of an employer who decides to

Continued

actually decidable on the concluding testimony of Al Bea in which he admitted that he had not resumed trucking at an earlier time because "the October 12th letter . . . says I'm out of business for a year." This astonishing inartfulness plainly means that he was specifically motivated to give only the appearance of not meeting the condition that would have triggered resumed representation rights by the Union. Beyond this, the *alter ego* characteristics of Dean Trucking are blatantly present. As an entity it extended no visible direction to the delivery operations it was ostensibly performing, and labor relations policies, to their primitive extent, were exclusively controlled by Adzovich and Miller, both of whom were fully aligned with Respondent. I discredit Al Bea's self-serving testimony relative to non-concern about the Union, and supposed amicability of his relationships with union functionaries, finding instead that the total circumstances disclose just the opposite and that he schemed to an unlawful result with more optimism than cleverness. I discredit Cox whose testimony was a mass of evasion, hesitation, and incredulous nonsense concerning the manner of performing business services for Dean Trucking. I find that in fact the various bookkeeping, banking, and payroll services were totally dependent on Respondent's consent, done openly on its premises, and could not have proceeded to completion but for Respondent's paternalistic interest in attempting to buttress her startling claims. I recognize that she received $150 in monthly compensation from the Dean Trucking bank account, however, this trivial attempt to counteract other realities is without significance.[5] Finally, I also discredit Sanchez, who has never met Dean and whose pathetic attempt to show that a *bona fide* collective-bargaining relationship arose with respect to representation of drivers on or about April 1980 is as unsuccessful as all other facets of this sordid unlawfulness. No more need be noted than that Sanchez could not even account for incoherence of his own supposed recognition agreement, a document so shameful that I trust for his sake it is not further memorialized in labor-management annals.[6] The result of a stripping away from these several fanciful versions is to reveal the unlawful refusal to meet and negotiate with the exclusive collective-bargaining representative of affected employees, and to coextensively establish alternate theories going to unlawful withdrawal of recognition, unlawfully unjustifiable repudiation of an agreement, and the unlawful setting of terms and conditions of employment in derogation of the Union's entitled role. The fact situation also warrants the 8(a)(3) finding which is sought, for Respondent willfully avoided the employment of certain drivers from and after early April 1980 because they were viewed as likely to seek or benefit from representation by the Union respecting their work performance and application of typical contract provisions to their employment. This overt discrimination has the consequence of discouraging their membership in a labor organization and warrants an express remedy. The exact scope of reinstatement and backpay rights cannot be ascertained on the present record,[7] and is thus left to fulfillment by compliance undertakings. Cf. *J. M. Tanaka Construction, Inc.*, 249 NLRB 238 (1980). Suffice it that Respondent, having caused the abrupt and unlawful cessation of an established, ongoing department in October 1979, is therefore obliged to bear all consequences and enjoy no beneficial presumptions of what would have occurred absent this conduct. A reconstruction of transportation services from and after April 1980, including close scrutiny of instances in which carriers other than Dean Trucking performed, should yield a reasonable formula for how the several individuals are to be made whole.

Accordingly, I render conclusions of law that Respondent, by giving assistance and support to United Brick and Clay Workers of America, Local No. 820, AFL-CIO, by discrimination against employees in regard to layoff, and by refusing to bargain collectively with the Union,[8] has violated Section 8(a)(1), (2), (3), and (5) of the Act as alleged.

[Recommended Order omitted from publication.]

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move his plant to run away from his union rather than for economic reasons, and an employer, who, as here, moves his plant for economic reasons but decides to utilize the move as an opportunity to get rid of the union, resorting to deceit and subterfuges including the setting up of a false front in an effort to conceal the fact that he remains the employer while he pretends to the union and his employees that he has ceased production and has nothing to do with employment at the new location.

[5] Respondent's several exhibits have been considered and found essentially immaterial, the barest exception being documentation as to worker's compensation coverage purchased by, and effective for, Dean Trucking during the period March 28-October 24, 1980. There is no reason to attach particular weight to this transaction beyond noting it as routine protection from liability arising randomly out of artifically entangled finances between Respondent and Dean Trucking.

[6] By letter dated June 1, 1981, Sanchez voluntarily subordinated the standing of his Brick and Clay Workers to disposition of this proceeding. In so doing he provided a necessary due-process foundation to the amended characteristic of the complaint, by which the General Counsel sought to establish an 8(a)(2) violation. This latter stated:

> In regards to case name, American Pacific Concrete Pipe Co., Inc. (AMPAC), and case No. 31-CA-10098. If the National Labor Relations Board rules that the Employer (AMPAC) must bargain with the Teamsters on wages and fringe benefits for the truck drivers, then the Brick and Clay Workers, local #820 disclaim all interest in the truck drivers.

[7] Implicitly, the chief discriminatees are Billy Martin, Robert Craig, Don Rolland, and Chuck Boothesby.

[8] I do not see good reason to allude further to the General Counsel's three alternative theories of 8(a)(5) violation as set forth in par. 12 of the amended complaint, because this finding on the merits and the associated remedy embrace all that would result from formally adopting such alternatives in their conceptual sense. However, I view this case as one in which unfair labor practices egregiously strike at the very heart of the Act in demonstration of a disregard for employees' fundamental statutory rights. On this basis I include broad remedial language in the Order about to be recommended. *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532 (4th Cir. 1941); *Emco Steel, Inc.*, 227 NLRB 989 (1977); *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979); *Tanaka, supra.*